SUPREME COURT OF THE
STATE OF WASHINGTON
Case No. 79001-9

AMERICAN SAFETY CASUALTY INSURANCE COMPANY, a foreign corporation,

Respondent,

v.

CITY OF OLYMPIA, a Washington municipal corporation,

Petitioner.

RESPONDENT'S ANSWER TO AMICUS CURIAE BRIEFS

Submitted by:

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I. INTRODUCTION

Respondent, American Safety Casualty Insurance Company ("American Safety"), submits the following response to the amicus curiae briefs submitted on behalf of Washington State School Construction Alliance, Washington State Association of Municipal Attorneys, and Association of Washington Cities[1] asking the Court to reverse the Court of Appeals decision in this case.

The briefs filed by amici assert the lower court's decision will discourage public entities from engaging in settlement negotiations with respect to disputes involving public contracts. The briefs further assert the Court of Appeals improperly applied Washington law regarding implied waiver.

Amici are mistaken on both counts. First, the Court of Appeals simply held that, ***in this particular case***, a factual question arose as to whether the City of Olympia's

[1] One brief has been filed on behalf of Washington State School Construction Alliance and a second brief has been filed on behalf of both Washington State Association of Municipal Attorneys and Association of Washington Cities.

actions constituted an implied waiver of contractual time limitations. The court did not, as amici apparently believe, hold that a party can never engage in settlement negotiations without risking waiver of its contractual rights.

Moreover, as explained in American Safety's earlier briefing, the Court of Appeals correctly applied Washington law regarding implied waiver to the facts of this case. Under these circumstances, amici's request for reversal of the lower court's decision should be rejected.

II. ARGUMENT

A. The Court of Appeals decision does not discourage settlement negotiations.

American Safety does not dispute that Washington has a strong public policy in favor of settling disputes. However, amici erroneously assert the Court of Appeals decision will have the effect of discouraging settlement negotiations. Amici fail to appreciate that the court's decision is based upon the particular facts of this case. As explained in American Safety's earlier briefing, the City's actions created, at a minimum, a question of fact as to

whether the City impliedly waived its right to rely on time requirements set forth in its contract with Katspan. Even though the deadline for submitting a claim had passed, the City repeatedly requested that American Safety provide additional information regarding the claim. With one exception, the City's post-deadline communications with American Safety failed to mention the contractual time requirements. Reasonable minds could differ as to whether the City intended to waive its right to rely upon those time requirements, and the Court of Appeals thus correctly concluded the City was not entitled to summary judgment on this issue.

As this Court recognized in *Mike M. Johnson, Inc. v. County of Spokane*,[2] a party may engage in settlement negotiations without waiving its rights under the contract. In that case, the county negotiated with a contractor but clearly stated it was not waiving its contractual rights by doing so.

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[2] *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003).

A party can easily protect its contractual rights by entering into settlement negotiations pursuant to a reservation of the rights. That is, if a party states, up front, that negotiations do not preclude it from later asserting contractual defenses, there should be no waiver as a matter of law.[3] That did not occur in this case, and the Court of Appeals correctly recognized a question of fact existed as to whether waiver occurred. The court's decision does not, as amici contend, prevent public entities from settling contract disputes; it merely recognizes that a party cannot repeatedly ignore its rights under a contract without creating a question of fact as to whether that conduct constitutes a waiver.

B. The Court of Appeals correctly applied existing Washington law regarding implied waiver.

Amici also assert the Court of Appeals ignored existing Washington case law requiring unequivocal conduct as evidence of waiver. In fact, the court

[3] Alternatively, the parties could enter into a tolling agreement pursuant to which contractual time deadlines would not be enforced.

specifically acknowledged, "[W]aiver by conduct 'requires unequivocal conduct evidencing an intent to waive.'"[4] The court then applied this rule to the facts of this case, concluding:

> The City's continued requests for information, its reference to future litigation, and its new deadline for production well beyond the contract limitations period create different inferences such that reasonable minds could differ about whether the City waived the contract terms. This raises a material question of fact about whether the City's intent was to rely on the contract terms to eliminate American Safety's ability to pursue its claim. Thus, it is a question of fact for the jury to decide and summary judgment was improper.[5]

Amici seem to argue that there can be no waiver unless reasonable minds could not disagree—i.e., only when the matter can be decided as a matter of law. The existence of a question of fact, they argue, means the evidence is equivocal. Amici are incorrect. As the Court of Appeals correctly recognized, the evidence in this case

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[4] *Am. Safety Cas. Ins. Co. v. City of Olympia*, 133 Wn. App. 649, 656-57 (2006) (quoting *Mike M. Johnson*, 150 Wn.2d at 391).

[5] *Am. Safety*, 133 Wn. App. at 660-61.

presents a question of fact for the jury to decide as to whether the City unequivocally waived the timelines in the contract.

Amicus Washington State School Construction Alliance also asserts implied waiver requires evidence of detrimental reliance by the other party. In support of this assertion, the School Construction Alliance cites *Reynolds v. Travelers Insurance Co.*[6] In *Reynolds*, the court explained the distinction between implied waiver, which does not require detrimental reliance, and equitable estoppel, which does: "A waiver is unilateral and arises by the intentional relinquishment of a right, or by a neglect to insist upon it, while an estoppel presupposes some conduct or dealing with another by which the other is induced to act or to forbear to act."[7]

Thus, the issue in this case is whether the City's unilateral conduct evidenced an intent to relinquish its right

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[6] *Reynolds v. Travelers Ins. Co.*, 176 Wash. 36, 28 P.2d 310 (1934).

[7] *Reynolds*, 176 Wash. at 45; *see also Kessinger v. Anderson*, 31 Wn.2d 157, 168-69, 196 P.2d 289 (1948) (citing *Reynolds*).

to assert the time limitation requirements in the contract with Katspan. Whether American Safety relied on the City's conduct is irrelevant to this inquiry.[8]

In sum, the Court of Appeals correctly applied Washington law regarding implied waiver to hold that a question of fact exists as to whether the City waived its rights under the contract, and amici's assertion to the contrary should be rejected.

III. CONCLUSION

For the reasons set forth above and in its earlier briefing, American Safety respectfully requests that the Court of Appeals decision be AFFIRMED.

[8] Even if detrimental reliance were required, the record establishes that American Safety did, in fact, rely on the City's failure to assert the time limitation requirements in the contract. In particular, American Safety expended considerable time and expense responding to the City's repeated requests for additional information regarding American Safety's claim. *See, e.g., Am. Safety*, 133 Wn. App. at 654-55.

DATED October 1, 2007.

BULLIVANT HOUSER BAILEY PC

By _____
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Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned certifies that on this 1st day of October, 2007, I caused to be served this document to:

Athan E. Tramountanas Thomas H. Wolfendale Preston Gates & Ellis LLP 925 Fourth Ave., Ste. 2900 Seattle, WA 98104-1158	☐ ☒ ☐	via hand delivery. via first class mail. via facsimile.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 1st day of October 2007, at Seattle, Washington.

Kim Fergin

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